

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

BROOKS RAYMOND WAMPLER,

Defendant and Appellant.

C060649

(Super. Ct. No. T08/0113F)

Defendant Brooks Raymond Wampler appeals a judgment entered following his no contest plea to one count of elder abuse. (Pen. Code, § 368, subd. (b)(1).) On appeal, he contends the trial court abused its discretion in refusing to grant him probation. We disagree, and shall affirm the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

The victim, defendant's 84-year-old mother Anita, was living in an apartment in Truckee at the time of these events.

---

<sup>1</sup> Because defendant entered his no contest plea during trial, the factual summary is based on the evidence adduced at trial and on the probation report filed in this case.

Anita had suffered from mental health issues for many years and, between late December 2007 and mid-January 2008, she was hospitalized for psychiatric treatment. Until February 2008, she used an oxygen tank but otherwise walked well and had a strong voice.

A social worker from adult protective services arrived at Anita's apartment on February 5, 2008, to perform a welfare check. A woman's voice responded from the inside, saying a few times "'go away, I don't need you. Go away[,] I don't need your help, I don't want your help, go away.'"

The social worker returned the following week. From behind the closed apartment door, the social worker detected a strong smell of urine. When the social worker received no response to her knock, she contacted police.

As police were turning the key in the door, they heard a man's voice say "'Hold on, I'm coming to the door.'" Defendant opened the door. When police asked if everything was all right, defendant paused, and then responded "no, I think I need some help." When they next asked if Anita was all right, defendant paused, and then responded, "'I think she needs help.'"

The smell of urine and feces was concentrated and pungent; the police officer described it as an "almost overpowering" smell associated with dead bodies.

They found Anita in the front bedroom, lying naked in a recliner chair, covered with a blanket and moaning a high-pitched, unintelligible moan that sounded like a "hurt animal." Anita was conscious, but the paramedic observed that she was

experiencing a "life[-]threatening" cardiac rhythm. She was extremely dehydrated; her tongue was completely dry and had dime-sized sores on it. She had oozing sores on her lower legs, and open sores along her spine and on her buttocks, some as large as four inches. Her mouth smelled like "dead body odor."

The reclining chair on which Anita had been sitting was stained with urine and feces.

While the paramedic attended Anita, a police officer began questioning defendant in the next room about his mother's medical history. At first, defendant was not forthcoming with any information about his mother; instead, he responded that the officer "didn't understand what he had been going through, and . . . [that] he'd been under siege for the last couple of weeks." He repeated the phrase "under siege" several times. Anita was having "mental problems," and sometimes she was violent or yelled at defendant. Defendant also reported he had been living with his mother for three weeks because he had been asked to leave the Holiday Inn where he had last been staying.

After paramedics took Anita to the hospital, an officer with special training in elder neglect or abuse cases began questioning defendant. He told the officer he had been trying to care for Anita for over three years, but also that he had been sick for three years and had not been able to do it. When the officer asked defendant about his mother's assets, defendant refused to answer directly, although the officer came to understand that Anita owned stock in Apple and some of it had been sold for \$8,600.

There was "barely any food" in the apartment apart from a can of diced tomatoes, a can of tuna, a box of Rice-a-Roni, and some pasta. Defendant told officers that his agreement with his mother was that he would cook food after she bought it.

Officers found two telephones, but neither was plugged in.

Defendant was charged with one count of elder abuse. (Pen. Code, § 368, subd. (b)(1).)

The trial commenced. In addition to the facts of Anita's discovery by police, the prosecution adduced evidence that, in the months before defendant began living with his mother, he charged his living expenses on her credit card until it was declined, and he told the manager of the hotel where he had been living that he "needed to get his mother into the proper frame of mind" to sell off some of her Apple stock to pay off his past due bill of \$3,800.

Shortly after he began to testify in his own defense at trial, defendant decided to change his plea from not guilty to no contest.<sup>2</sup>

---

<sup>2</sup> The record reflects that defendant entered what the court referred to as a "West-Alford" plea of no contest. *People v. West* (1970) 3 Cal.3d 595, upheld the practice of upholding plea bargaining to a lesser related offense. In contrast, defendant represented he entered this plea while continuing to factually deny guilt. Although such pleas are sometimes referred to as "West" pleas, they are really "Alford" pleas, based on *North Carolina v. Alford* (1970) 400 U.S. 25, 37-38 [27 L.Ed.2d 162, 171-172], which upheld a guilty plea entered by a defendant who professed belief in his innocence.

In advance of sentencing, the probation department prepared a report recommending that defendant be denied probation and sentenced to prison for the midterm of three years because, although he is statutorily eligible for probation, the totality of the circumstances indicate he is not a suitable candidate: "[D]efendant allowed the victim, a dependent elder, to live in deplorable conditions. The victim was found sitting in her own urine and feces. It appears that the defendant was also not feeding the victim. If the defendant were not capable of caring for the victim, a prudent person would have called for assistance either with local agencies or persons known by the defendant and his mother. It appears no calls for assistance were forthcoming."

Defendant submitted a "Sentencing Statement/Statement in Mitigation" requesting that he be granted probation. He emphasized his lack of a prior record or history of alcohol or drug abuse, his ties to the community and ability to comply with conditions of probation, and urged that he presents no danger to the general public. He argued that his actions were at most, negligent, not intentional, and his mother's vulnerability cannot be considered because it is an element of the offense. In addition, he asked the court to consider that, when Anita was admitted to the hospital in December 2007, before defendant began living with her, she already had a stage one bedsore on her back and chronic edema on her legs; she was generally noncompliant with treatment and refused to take medication; and

he deposited money into her savings account in 2003 that they both used for living expenses.

At sentencing, the court announced it had read and considered both documents. At the start of the hearing, it opined the "case is problematic" because (among other things) defendant has no prior criminal history and his mother had a "solid resistance to mental health intervention." Even so, the court reasoned the case "is all about the failure, for whatever reason, to make a phone call. It doesn't sound like much until you realize the consequences of not making a phone call. His mother could have died. Now, to be sure, there's no doubt in my mind the relationship between Ms. Wampler and [defendant] is complex and nuanced[d], I understand that. [¶] But when you strip the case down to its core, I ultimately come to the following conclusion[, ] that despite his lack of a criminal record, that his lifestyle and his circumstances in life are such that he does not pose himself as a person who's going to be meaningfully supervised. That his failure to make a simple phone call to protect his mother at the very least caused her to be, in my estimation, at death's door."

The court ultimately determined not to grant defendant probation and sentenced him to prison for the low term of two years. It explained the reasoning underlying its decision to deny probation at length: "Going through the Rules of Court as I must.

"The defendant clearly is eligible for a grant of probation.

"The nature and circumstances of this offense in the view of the Court appear more serious than those in that at the time of intervention the victim, his mother, was close to expiration. I'm not prepared to necessarily conclude the omissions of the defendant was a one-time event.

"I think basically the circumstance here was one that was a troubled one for the defendant, and he chose to deal with it in a certain fashion. If you look at elder abuse as like an assault, perhaps that's a different way of looking at it. In other words, a person can commit multiple assaults or multiple bad acts upon an elder. When you have neglect as the underpinning, it's true that neglect is not a one-time incident, but I think you have to understand neglect for what it is. It just simply is neglect.

"The vulnerability of the victim was significant given her age, and the fact that she, given the mental health issues presented, was a dependent adult.

"The defendant, by his omissions, exacerbated her physical conditions. It's unclear to me whether he actually imposed emotional injury to her. And I say that recognizing the psychological circumstances of the victim.

"Because he was the one that was immediately at hand and could intervene if need be, he was an active participant.

[¶] . . . [¶]

"[Defendant] has no prior record of criminal conduct.

"He has expressed a willingness to comply with probation terms. More about that in a moment.

"His ability to comply is, in my mind, somewhat doubtful. Let me elaborate. . . . What I perceive, and maybe it's incorrect, is the defendant mirrors the same healthy suspicion bordering on almost paranoia about government, people in authority, and I viewed the defendant as one of the most closed defendants, through court appearances, communication and choices. . . . [¶] . . . [¶]

"I believe the defendant is remorseful for his situation. He is, I think, sorry that his mother took the position that she did, but I'm not sure if he's really willing to accept responsibility for the relatively simple act that could have avoided most of it. . . .

"Probation concludes, and I do, too, he's not a danger to others unless imprisoned. . . . [¶] . . . [¶]

"Am I to deny a person [probation] because I can't fashion reasonable probation orders? No. But the case is just one where probation honestly seems meaningless. The defendant, in my view, wouldn't benefit by a grant of probation compared to anything else because the reality is the damage is done. The breach of the duty that's imposed upon him is irrevocable, and you can't put Humpty Dumpty back together again, and ultimately the Court then comes back to what its real role is. You protect society and you deter others."

#### **DISCUSSION**

Defendant contends the trial court abused its discretion by denying his request for probation, because it considered



improper factors and did not consider relevant factors. We are unpersuaded.

“‘All defendants are eligible for probation, in the discretion of the sentencing court [citation], unless a statute provides otherwise.’ [Citation.] ‘The grant or denial of probation is within the trial court’s discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]’ [Citation.] ‘In reviewing [a trial court’s determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court’s order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.’ [Citation.]” (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311; *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 825.)

“The decision to grant or deny probation requires consideration of all the facts and circumstances of the case. [Citation.]” (*People v. Birmingham* (1990) 217 Cal.App.3d 180, 185.)

The California Rules of Court<sup>3</sup> set forth the policies and criteria that should guide the trial court’s grant or denial of probation. Rule 4.410 provides:

“(a) General objectives of sentencing include:

---

<sup>3</sup> Further references to rules are to the California Rules of Court.

"(1) Protecting society;

"(2) Punishing the defendant;

"(3) Encouraging the defendant to lead a law-abiding life in the future and deterring him or her from future offenses;

"(4) Deterring others from criminal conduct by demonstrating its consequences;

"(5) Preventing the defendant from committing new crimes by isolating him or her for the period of incarceration;

"(6) Securing restitution for the victims of crime; and

"(7) Achieving uniformity in sentencing.

"(b) Because in some instances these objectives may suggest inconsistent dispositions, the sentencing judge must consider which objectives are of primary importance in the particular case. The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case."

Regarding a trial court's decision whether to grant or deny probation, rule 4.414 provides (as relevant to the issues raised by defendant's appeal):

"Criteria affecting the decision to grant or deny probation include facts relating to the crime and facts relating to the defendant.

"(a) **Facts relating to the crime**

"Facts relating to the crime include:

"(1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime;

[¶] . . . [¶]

"(3) The vulnerability of the victim; [¶] . . . [¶]

"(6) Whether the defendant was an active or a passive participant;

"(7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur; [¶] . . . [¶] [and]

"(9) Whether the defendant took advantage of a position of trust or confidence to commit the crime.

"(b) **Facts relating to the defendant**

"Facts relating to the defendant include:

"(1) Prior record of criminal conduct . . . ; [¶] . . . [¶]

"(3) Willingness to comply with the terms of probation;

"(4) Ability to comply with reasonable terms of probation as indicated by the defendant's age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors; [¶] . . . [¶]

"(7) Whether the defendant is remorseful; and

"(8) The likelihood that if not imprisoned the defendant will be a danger to others."

In deciding whether to grant or deny probation, a trial court may also consider additional criteria not listed in the rules provided those criteria are reasonably related to that decision. (Rule 4.408(a).) A trial court is required to state its reasons for denying probation and imposing a prison sentence, including any additional reasons considered pursuant to rule 4.408. (Rules 4.406(b)(2) & 4.408(a).) Unless the

record affirmatively shows otherwise, a trial court is deemed to have considered all relevant criteria in deciding whether to grant or deny probation or in making any other discretionary sentencing choice. (Rule 4.409.)

“The circumstances utilized by the trial court to support its sentencing choice need only be established by a preponderance of the evidence. [Citations.]’ [Citation.] Accordingly, in determining whether a trial court abused its discretion by denying probation, we consider, in part, whether there is sufficient, or substantial, evidence to support the court’s finding that a particular factor was applicable.” (People v. Weaver, supra, 149 Cal.App.4th at p. 1313.) However, a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it, and this court is neither authorized nor warranted in substituting our judgment for that of the trial judge. (People v. Carmony (2004) 33 Cal.4th 367, 376-377.)

Defendant argues the trial court relied on “invalid aggravating factors” in its decision not to grant his request for probation. Specifically, he contends that the court erred in finding that the nature and circumstances of the offense were more serious than other instances of the crime (rule 4.414(a)(1)); that the victim was vulnerable because her age was an element of the crime; and there was “no evidence that [her] psychiatric condition made her more vulnerable” (rule 4.414(a)(3)) or that defendant was an “active” participant in the crime (rule 4.414(a)(6)).

We find no error. First, defendant's claims of error are not supported by the record. The trial court exhaustively considered all of the relevant facts bearing on both the incident at issue and defendant. In so doing, it considered the probation report, the sentencing statement in mitigation, arguments of counsel, and testimony of witnesses. The court's remarks make clear it seriously contemplated defense counsel's proposal that defendant receive formal probation. The court gave a well-reasoned and considered explanation for its decision to deny probation.

Second, we reject defendant's assertion that the court had no proper basis for its conclusion the crime at issue here appeared more serious than other instances of elder neglect. The testimony and report of the officer and paramedic established that Anita's condition was life threatening: she had become so dehydrated her tongue was dry, swollen, black, and ulcerated; she was experiencing life-threatening cardiac rhythms; and she had four-inch bedsores. This not only established the seriousness of her condition and that she was close to death, it also supported the court's inference that defendant's neglect was not a "one-time event." Rather, defendant had seen his mother's condition slowly deteriorate over the three weeks he had been living with her and yet had done nothing to obtain any assistance for her. On every single one of those days, as Anita's condition worsened, defendant could, and should, have taken some action to secure help, and he did not.

We also find no error in the court's finding that Anita was a vulnerable victim. True, the notion that her age rendered her vulnerable is an element of the crime of elder abuse. But the court did not rest its finding she was vulnerable solely on her age: it also noted that it was Anita's "mental health issues" that made her vulnerable, and that conclusion is supported by the evidence. She was resisting care, could not feed herself, would not go to the hospital voluntarily, and was incontinent. Her inability or unwillingness to recognize her own needs and ask for help rendered her vulnerable. And that vulnerability made her particularly reliant upon defendant -- who was ostensibly living with her for the express purpose of taking care of her -- to be alert to her needs and to act in a timely fashion to try to assist her. We reject defendant's assertion that persuading his mother to accept help might have proved difficult and absolved him from the obligation of making some effort to do so.

While we agree with defendant that concluding he was an "active" participant in the crime because he "was immediately at hand and could intervene if need be" is part and parcel of the crime of criminally negligent elder abuse (Pen. Code, § 368 [imposing criminal liability on one who "having the care or custody of any elder or dependent adult . . . permits the person or health of the elder or dependent adult to be injured"]), we find no reversible error. The trial court thoughtfully exercised its discretion, and its decision to deny defendant

probation was neither irrational nor arbitrary. (See *People v. Carmony, supra*, 33 Cal.4th at pp. 376-377.)

**DISPOSITION**

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

SIMS, J.

NICHOLSON, J.